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MILITARY ASSISTANCE TO CIVILIAN NARCOTICS LAW ENFORCEMENT: AN INTERIM REPORT

FORTY-SECOND REPORT

BY THE

COMMITTEE ON GOVERNMENT OPERATIONS

Y1.1/8:97-921

OCTOBER 1, 1982.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

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LETTER OF TRANSMITTAL

HOUSE OF REPRESENTATIVES,
Washington, D.C., October 1, 1982.

Hon. THOMAS P. O'NEILL, Jr.,
Speaker of the House of Representatives,
Washington, D.C.

DEAR MR. SPEAKER: By direction of the Committee on Government Operations, I submit herewith the committee's forty-second report to the 97th Congress. The committee's report is based on a study made by its Government Information and Individual Rights Subcommittee.

JACK BROOKS,
Chairman.

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97TH CONGRESS, 2d Session | HOUSE OF REPRESENTATIVES | REPORT No. 97-921

MILITARY ASSISTANCE TO CIVILIAN NARCOTICS LAW ENFORCEMENT: AN INTERIM REPORT

OCTOBER 1, 1982.—Committed to the Committee of the Whole House on the State of Union and ordered to be printed

Mr. BROOKS, from the Committee on Government Operations, submitted the following

FORTY-SECOND REPORT

BASED ON A STUDY BY THE GOVERNMENT INFORMATION AND INDIVIDUAL RIGHTS SUBCOMMITTEE

On September 28, 1982, the Committee on Government Operations approved and adopted a report entitled "Military Assistance to Civilian Narcotics Law Enforcement: An Interim Report." The chairman was directed to transmit a copy to the Speaker of the House.

I. INTRODUCTION

For years committees of Congress have chronicled the plight of American law enforcement agencies in the fight against narcotics traffickers.[1] A common theme among the findings of these committees has been that the smuggleers, bolstered by the huge profits of their criminal endeavors, could afford equipment (airplanes, boats, radios, etc.) superior to that which was being deployed against them, thus maintaining a continuing edge over the forces of law and order.

Law enforcement officials were frustrated by their inability to react in time to the scant intelligence they received concerning the movement of drug-laden ships and, more especially, aircraft. Tech-

[1] See, e.g., House Committee on Government Operations, "Federal Effort Against Organized Crime: Report on Agency Operations," H. Rept. 90-1574, 90th Congress, 2d Session; Senate Committee on Governmental Affairs, "Illegal Narcotics Profits," Sen. Rept. 96-887, 96th Congress, 2d Session.

nology had overtaken the meager perimeter defense which could be mustered by the Customs Service, the Coast Guard, and other anti-smuggling agencies. Only the Department of Defense possessed the assets which were required to detect, identify and track many of the smugglers, but the Department of Defense was prohibited, in most cases, from assisting civilian law enforcement authorities because of the Posse Comitatus Act,[2] and a tradition in this country that the Armed Forces did not participate in the enforcement of civilian statutes in the civilian community.

With the passage of Public Law 97-86, the Congress removed much of the posse comitatus prohibition, clearly signalling to DOD that its members no longer needed to fear prosecution for actions of cooperation in the war against drug smuggling.

The first part of this report is a review of the Posse Comitatus Act and the recent Congressional action to provide an exception to that Act, permitting limited military cooperation with civilian law enforcement. It must be noted that many questions concerning military assistance to civilian law enforcement remain to be answered; that the law is not as precise on all points as it could be; that technicalities can be argued both for and against, depending on the viewpoint of the person involved.

The second part of the report deals principally with experiences in the operational implementation of assistance to the task force created by the President to deal with narcotic smuggling and violent crime in South Florida. In large measure DOD was unprepared for the early deployment of such large amounts of miltiary assets, but made a credible effort to support even though implementing guidelines were yet to be written, and internal policies were only beginning to be developed.

This is an interim report. It is not intended to resolve all the questions which may persist; many of them come under the jurisdiction of other committees. The efforts undertaken to date by the Committee have been directed toward insuring that the early implementation of military assistance be appropriate in scope, that waste and inefficiency be identified and corrected, and that a mechanism be developed both within DOD and the civilian community to institutionalize proper coordination, planning, and communication.

The subcommittee held 4 days of hearings,[3] on February 22, May 19, and 20, and August 18, 1982. Among the principal witnesses appearing (some on several occasions) were:

Mr. James N. Juliana, Principal Deputy Assistant Secretary, Manpower, Reserve Affairs and Logistics, Department of Defense;

Mr. John M. Walker, Assistant Secretary for Law Enforcement, Department of the Treasury;

Mr. William von Raab, Commissioner, U.S. Customs Service;

Mr. Charles F. Rinkevich, Coordinator, South Florida Task Force;

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[2] 20 Stat. 152; 18 U.S.C. 1385

[3] "Military Assistance to Civilian Narcotics Law Enforcement," hearings before a Subcommittee of the Committee on Government Operations, House of Representatives, 97th Congress, Second Session, February 22, May 19 and 20, and August 18, 1982 (hereinafter cited as "Hearings").

Mr. Tidal W. McCoy, Assistant Secretary for Manpower and Reserve Affairs, Department of the Air Force;

Mr. J. Ronald Denney, Acting Assistant Secretary for Manpower and Reserve Affairs, Department of the Navy;

Mr. Patrick Hillier, Acting Assistant Secretary for Installation, Logistics, and Financial Management, Department of the Army.

It is of utmost importance that the best possible effort be made to insure the success of this potent addition to the fight against illegal drugs. Because of the controversial nature of military assistance, excesses and inappropriate activity must be avoided. Because of the urgent needs of the law enforcement community, all assistance which properly can be rendered must be rendered.

That there have been delays in implementation of DOD field guidance, incompatibility between different communications systems, and some duplication of effort, was to be expected. For the most part these difficulties have been or should soon be resolved, and will be reported upon in full in the Committee's final report in the next Congress.

The Committee understands that the process of implementation of DOD assistance must be careful and deliberate. But just as thoughtless requests from civilian agencies must be discouraged, so must unreasonable foot dragging at DOD be overcome.

The hearing process continues. This interim report is considered timely, however, since the bulk of military assistance which is anticipated in support of the South Florida Task Force has been identified, and all three Services have become involved. The first year's experience is behind us, and the Assistant Secretary of the Treasury for Enforcement has recommended that the concept be expanded to other areas of the country. It is expected that the recommendations of this report, upon being integrated by DOD and the law enforcement community, will help achieve the objectives of PL 97-86: more effective law enforcement and a reduction of drug trafficking in this country.

II. Statutes Governing the Use of the Military in Cooperation With Civilian Law Enforcement

A. THE POSSE COMITATUS ACT [4]

"Posse comitatus" (literally "to have assistance available") was defined at common law as all those over the age of 15 upon whom a sheriff could call for assistance in preventing any type of civil disorder.[5] The Posse Comitatus Act (18 U.S.C. 1385) makes it a felony "except in cases and under circumstances expressly authorized by the Constitution or Act of Congress [to] willfully use any part of the Army or Air Force as a posse comitatus or otherwise to excute the law."

As originally proposed, the Act would have applied to all of the armed services.[6] The final version of the Act, however, mentioned

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[4] The Committee wishes to acknowledge the contribution of Kent M. Ronhovde, Legislative Attorney, Congressional Research Service, Library of Congress, for his assistance in the preparation of this section of the report.

[5] 1 W. Blackstone, *Commentaries* 343-44.

[6] 7 Cong. Rec. 3586 (1878) (remarks of Rep. Kimmel).

only the Army, because the Act was a rider to an Army appropriations bill.[7] The reference to the Air Force was added in 1956 to the Act when it was codified in title 18 of the United States Code to take into account the separation of the Air Force from the Army. Even though not legally bound by the strictures of the Act, Navy Department regulations directed Navy and Marine Corps personnel to comply with it.[8] The peacetime Coast Guard is not covered by the Act. Under the provisions of 19 USC 1401 and 14 USC 143, Coast Guard officers are deemed to be officers of the United States Customs Service and thus are authorized to execute civilian laws.

According to a spokesperson for the Department of Justice, no one has been charged or prosecuted under the Posse Comitatus Act since its enactment.[9] While only a limited number of cases have been reported under the Posse Comitatus Act, they suggested varying standards for the determination of the point at which military assistance becomes sufficient to constitute a violation. Because of these varying interpretations, there was uncertainty as to the nature and the extent of the assistance that could be rendered by the military to civilian enforcement.[10]

B. LEGISLATIVE EXCEPTIONS TO THE POSSE COMITATUS ACT

The Posse Comitatus Act makes specific exception for the use of the military in the execution of the laws "when expressly authorized by * * * Act of Congress." The 97th Congress enacted legislation, approved December 1, 1981, designed to avoid and clarify restrictions on military assistance to civilian law enforcement imposed by the Posse Comitatus Act.

Section 908 of Public Law 97-86, the Department of Defense Authorization Act, 1982, added a new chapter to title 10, United States Code, entitled "Chapter 18—Military Cooperation with Civilian Law Enforcement Officials". Prompted by continued concern over the massive influx of controlled substances and illegal immigrants into the United States and the potential application of the Posse Comitatus Act to restrict military assistance to deal with those law enforcement concerns, this new chapter 18 of title 10 would, according to the conferees on S. 815 (which became PL 97-86),

> (1) Permit various forms of military assistance to civilian law enforcement officials, (2) restrict the direct participation of military personnel in law enforcement activities, (3) require that furnishing assistance not adversely affect military preparedness, (4) provide for reimbursement for assistance to civilian authorities, and (5) make clear that

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[7] Forty-fifth Congress, 2nd Session, Chap. 263, sec. 15 (20 Stat. 152).

[8] Secretary of Navy instruction 5820.7 (May 15, 1974). The U.S. Court of Appeals for the Fourth Circuit in *United States* v. *Walden*, 490 F.2d 372 (4th Cir.), *cert. denied*, 416 U.S. 983 (1974), relied upon a 1969 predecessor to the 1974 Instruction of the Secretary of the Navy to find the Navy bound by the restriction of the Posse Comitatus Act.

[9] Statement of Edward S. G. Dennis, Jr., Chief, Narcotics and Dangerous Drug Section, Criminal Division, Department of Justice before the Subcommittee on Crime, House Committee on the Judiciary, June 3, 1981.

[10] For a discussion of decisions interpreting the Act, see the report of the House Committee on the Judiciary on H.R. 3519, "Department of Defense Authorization Act, 1981", H. Rpt. 97-71, Part 2, 97th Congress, 1st Session, pp. 4-7.

the chapter does not limit the authority granted by existing law.[11]

§ 371. Use of information collected during military operations

Relying upon a 1977 Congressional Research Service study,[12] the Permanent Subcommittee on Investigations found no case which definitely answered the question whether the military could or could not provide to law enforcement officials information gathered from radar and other sources.[13] Section 371 thus authorizes the Secretary of Defense to provide information collected during the normal course of military operations to civilian law enforcement agencies.

Department of Defense General Counsel, William H. Taft IV, provided the House Judiciary Subcommittee on Crime with examples of what section 371 would allow:

> * * * when the armed forces obtain information in the course of a prosecution of a service member under the Uniform Code of Military Justice concerning an alleged civilian coconspirator, that information may be provided to the appropriate civilian authorities. Another example involved information acquired by the Air Force during AWACS training flights which is made available to the United States Customs Service.[14]

George C. Corcoran Jr., Assistant Commissioner for Border Operations, U.S. Customs Service, added that section 371 would enable direct radio communications between military personnel at military radar sites and U.S. Customs interceptor aircraft regarding the location of a suspected airborne smuggler.[15]

Corcoran noted that, since 1975, the Customs Service had been receiving strategic intelligence information from the Defense Intelligence Agency. It also had direct contact with the individual service's intelligence and investigative components to receive data pertinent to Customs inspectional, interdictory, and investigatory missions.[16]

These relationships exemplify the observation of the House Judiciary Committee that section 371 was "a codification of existing administrative practice and nothing more."[17] Nevertheless, the House Judiciary Committee stated that it anticipated an increased sensitivity in the military departments to the needs of civilian law enforcement officials, particularly in drug enforcement, which would permit more compatible mission planning and execution. As

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[11] Conference Report to accompany S. 815, Department of Defense Authorization Act, 1982, H. Rpt. 97-311 (Hereinafter "Conference Report"), p. 119.

[12] "Use of Military against Drug Smugglers in Southwestern United States", Congressional Research Service, Library of Congress, April 14, 1977.

[13] Permanent Subcommittee on Investigations, Senate Governmental Affairs Committee, "Illegal Narcotics Profits", S. Rpt. 96-887, 96th Congress, 2nd Sess., p. 112.

[14] Statement of William H. Taft, IV, General Counsel, Department of defense, before the Subcommittee on Crime of the House Committee on the Judiciary, June 3, 1981, p. 3.

[15] Statement of George C. Corcoran, Jr., Assistant Commissioner (Border Operations) U.S. Customs Service, before the Subcommittee on Crime of the House Committee on the Judiciary, June 3, 1981, p. 3.

[16] Id. at 3-4.

[17] House Committee on the Judiciary, "Department of Defense Authorization Act, 1982", H. Rpt. 97-71, Part 2, 97th Congress, 1st Sess., (Hereinafter "Judiciary Committee Report") pp. 8 and 9.

an example, the committee suggested that the "scheduling of routine training missions can easily accommodate the need for improved intelligence information concerning drug trafficking in the Caribbean.," [18]

Section 371 contains three limitations on the provision of information collected by the military departments:

First, the information must be collected during the "normal course of military operations". As noted above, however, it is not contemplated that this provision would prohibit planning and execution of military operations which also accommodate the needs of civilian law enforcement agencies. But, the Judiciary Committee Report states that "The Committee does not intend the military to engage in the routine collection of intelligence information about United States residents" thus negating, in the Committee's view, the risk that the military would return to the abuses exposed in previous Congressional hearings.[19] In a footnote, it stated further that the Committee adopted the view of the Justice Department that the weight of authority on the Posse Comitatus Act

> prohibits the use of military personnel as informants, undercover agents, or non-custodial interrogators in a civilian criminal investigation that does not involve potential military defendants or is not intended to lead to any official action by the armed forces.[20]

Nevertheless, the Committee added, that "nothing in this section is intended to modify in any way existing law with respect to the military's authority (or lack thereof) to collect and disseminate intelligence information about American citizens and residents here and abroad." [21]

Second, the provision of information must be "in accordance with other applicable law". This is meant to assure the continued application of the Privacy Act [22] to such information sharing. Prior to enactment of section 371, the Department of Defense provided for "routine use" disclosures of information as allowed under the Privacy Act.[23]

Third, the information may only be given to law enforcement officials who have jurisdiction to enforce the laws to which the disclosed information may be relevant.

§ 372. Use of Army, Navy, Air Force, and Marine Corps equipment and facilities

Section 372 permits the Secretary of Defense to make available, in accordance with other applicable law, any equipment, base facility, or research facility of the Army, Navy, Air Force, and Marine Corps to any civilian law enforcement official for law enforcement purposes.

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[18] Id., at 8.
[19] Id.
[20] Id., citing letter from Mary C. Lawton, Office of Legal Counsel, Department of Justice to Deanne Siemer, General Counsel, Department of Defense, March 29, 1978, at page 2.
[21] Id., The Committee cited, as an example of the military's authority (or lack thereof), Executive Order 12036 which was revoked and replaced on December 4, 1981, by Executive Order 12333, "United States Intelligence Activities."
[22] Public Law 93-579; 5 USC 552a.
[23] 46 Fed. Reg. 656 (1981).

This section is intended to clarify that the provision of equipment by the military departments for law enforcement purposes does not violate the Posse Comitatus Act. Otherwise, there was no intent to change existing practices under the numerous statutes which permit Federal agencies, including the military departments, to loan and otherwise dispose of federal property.[24] Inclusion of the phrase "in accordance with other applicable law" is meant to assure the continued application of existing law, such as the Federal Property and Administrative Services Act of 1949.[25]

One example of existing practices are the Army's regulations governing the loan of Army materiel.[26] In that regulation, the Department of the Army identified three general and twenty-two specific statutes governing the loan of Army property. The most pertinent of these in terms of loans to state and local law enforcement officials is the Leasing Statute, 10 USC 2667. Loans may be made to non-DOD departments, agencies, activities, or individuals when it is determined that the materiel is not, for the period of the lease, needed for public use, is not excess property, and that the loan will promote the national defense or be in the public interest. Such a lease must not be for more than one year (or be renewed/extended for a total period of more than five years) and, it must provide that the lessee will pay a fair monetary rental.

Loans to federal departments and agencies are governed by the Economy Act, 31 USC 686. Federal agencies borrowing DOD materiel pursuant to this Act are responsible for reimbursing DOD for all DOD costs incident to the delivery, return, and repair of the materiel.

The House Judiciary Committee report stated, with respect to section 372 that it expected this section "to encourage efficient administrative practices of the DOD in processing requests for equipment loans. The Committee does not, however intend the military to become the routine supplier of basic equipment for civilian law enforcement agencies."[27]

§ 373. Training and advising civilian law enforcement officials

This section permits the Secretary of Defense to assign members of the Army, Navy, Air Force, and Marine Corps to train federal, state, and local civilian law enforcement officials in the operation and maintenance of equipment made available under section 372 and to provide expert advice relevant to the purposes of the chapter.

The House Judiciary Committee report stated that it did not contemplate creation of large scale or elaborate training programs but rather the authority to satisfy the need to train civilians in the operation and maintenance of equipment lent under section 372. In a footnote, the Committee further explained that this section "would not authorize the routine use of a Green Beret training course for urban SWAT teams." [28]

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[24] Judiciary Committee Report, p. 9.
[25] Conference Report, p. 119.
[26] Army Regulation 700.131 (1 July 1980).
[27] Judiciary Committee Report. p. 9.
[28] Id. at 10.

§ 374. Assistance by Department of Defense personnel

Under the provisions of this section, military personnel are authorized to operate and maintain (or assist in the operation and maintenance of) equipment made available under section 372.

As delineated in the Conference Report, such assistance must be limited to situations where the training of civilian personnel would be unfeasible or impractical from a cost or time perspective; and, the request for such assistance should come from the Cabinet-level official heading the federal agency with jurisdiction to enforce the criminal provisions of federal narcotics, immigration, or customs laws.[29]

Under section 374(b), equipment made available to civilian law enforcement agencies or officials under section 372 may be operated by or with the assistance of military personnel only to the extent the equipment is used for monitoring and communicating the movement of air and sea traffic. As the conferees stated, "Indeed, this is the primary type of assistance sought and needed by federal drug enforcement agencies." [30]

Because of their recognition of certain limited, emergency circumstances where it would be helpful if equipment provided under section 372 and operated by DOD personnel could be used for more than data collection, the conferees agreed to section 374(c) which permits the use of such equipment as a base of operations outside the land area of the United States in certain emergency situations. The Secretary of Defense and the Attorney General must jointly determine that an emergency circumstance exists and the equipment made available under section 372 and operated by DOD personnel may not be used to interdict or to interrupt to passage of vessels or aircraft. Section 374(c) defines an emergency circumstance to exist only when the size and scope of the suspected criminal activity in a given situation poses a serious threat to the interests of the United States and enforcement of federal narcotics, immigration, or customs laws would be seriously impaired if such military assistance were not provided. The conferees stated that:

> That definition is intended to focus on the threat of large scale criminal activity at a particular point in time or over a finite period. It should not be construed to permit the declaration of an emergency which would permit use of this authority on a routine or extended basis.[31]

The conferees provided an example of what it contemplated by this provision:

> . . . if the Coast Guard, in an emergency circumstance, is launching an enforcement operation out of the United States Naval Base at Guantanamo Bay, Cuba, Coast Guard or DEA personnel could be transported to or from the base—from any location—in military equipment utilizing military personnel to operate such equipment.[32]

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[29] Conference Report, p. 120.
[30] Id.
[31] Id.
[32] Id. at 121.

The conferees noted that, while such assistance is permitted only under emergency circumstances, they intended that the need to provide such assistance could itself be an important factor to consider when determining whether enforcement would be seriously impaired if the military assistance were not provided.[33]

§ 375. Restriction on direct participation by military personnel

This section requires the Secretary of Defense to issue regulations to insure that the provision of any assistance under Chapter 18 does not include direct participation by a member of the Army, Navy, Air Force, or Marine Corps in an interdiction of a vessel or aircraft or in a search, seizure, arrest, or other similar activity, unless such activity is otherwise authorized by law.

The section is the result of two different approaches taken by the House and the Senate. The Senate bill would have prohibited military personnel from making arrests, searches, or seizures unless otherwise authorized by law. The House bill contained a similar limitation, but provided an exception which would allow military personnel to assist in arrests and seizures outside the land area of the United States under certain limited circumstances. Because none of the federal enforcement agencies requested such authority for military personnel, the conferees deleted the limited authority contained in the House bill.[34]

The conferees noted that nothing in this section limits the inherent authority of military personnel to defend themselves or to protect federal property.

§376. Assistance not to adversely affect military preparedness

This section requires the Secretary of Defense to issue regulations to insure that assistance rendered by the Department of Defense under Chapter 18 not adversely affect the military preparedness of the United States.

According to the House Judiciary Committee, this section

> recognizes that the fundamental and paramount goal of the military is national defense. Thus, the Secretary may not approve a request for any assistance, no matter how incidental, if it will have an adverse consequence with respect to military preparedness.[35]

§377. Reimbursement

This section requires the Secretary of Defense to issue regulations providing that reimbursement may be a condition of assistance to a civilian law enforcement Official under Chapter 18.

The conferees stated simply that "the regulation should reflect sufficient flexibility to take into consideration the budgetary resources available to civilian law enforcement agencies."[36] The House Judiciary Committee went further. It noted that this provision was acceptable to the Coast Guard, Customs Service, and the Department of Justice (the federal agencies most likely to request

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[33] Id.
[34] Conference Report, p. 121.
[35] Judiciary Committee Report, p. 10.
[36] Conference Report, p. 122.

assistance) and should not require any immediate increase in the budgets of those agencies. And, the Committee added,

> The availability of this reimbursement option is not meant to serve as an excuse for the Secretary of Defense to decline to cooperate in the provision of assistance. Rather, the reimbursement option should serve instead as an informal check of the magnitude and frequency of the requests made by civilian law enforcement officials.[37]

§ 378. Nonpreemption of other law

This section directs that nothing in Chapter 18 shall be construed to limit the authority of the executive branch in the use of military personnel or equipment for civilian law enforcement purposes beyond that provided by law prior to its enactment on December 1, 1981.

The conferees stated that nothing in Chapter 18 should be construed to expand or amend the Posse Comitatus Act.[38] Because the Posse Comitatus Act, on its face, applies to the Army and Air Force and not the Navy and Marine Corps, the conferees wanted to ensure that the provisions of Chapter 18 would not be interpreted to limit the authority of the Secretary of Defense to provide Navy and Marine Corps assistance pursuant to a request made by the Attorney General under 21 U.S.C. 873(b).[39] But, the conferees further explained that nothing in Chapter 18 is in any way intended to rescind or direct the rescission of any current regulations applying the policies and terms of the Posse Comitatus Act to the activities of the Navy or Marine Corps.[40]

III. Implementation of Military Assistance

A. INITIAL ORGANIZATION

Upon passage of the legislation discussed in Section I of this report, certain organizational steps were required on the part of both the Department of Defense and the civilian law enforcement community. It was envisioned that regulations would be developed and disseminated to the various Services by DOD in Washington, and that the Services would implement such assistance as might be deemed appropriate.

The civilian agencies, on the other hand, were expected to identify their needs on a coordinated basis, and to communicate them to the military for consideration.

This scenario was preempted by the White House, however, when, in response to the serious drug smuggling problem in south Florida, the President on January 28, 1982 announced formation of a special task force, and charged the Vice President with its direction.

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[37] Judiciary Committee Report, p. 11.

[38] Conference Report, p. 122.

[39] 21 USC 873(b), a provision of the Comprehensive Drug Abuse Prevention and Control Act of 1970, provides "When requested by the Attorney General, it shall be the duty of any agency or instrumentality of the Federal Government to furnish assistance, including technical advice, to him for carrying out his functions under this subchapter."

[40] ID., and see discussion at footnote 5, infra.

The military community

A central feature of the task force was to be the vigorous participation of the military in stemming the flow of drugs. In a February 24, 1982 memorandum to the Secretary of Defense[41] the Vice President stated: "I know that you are conducting a rapid review of the recent changes to *posse comitatus* and expect to have guidelines out sometime next month. I would appreciate it if you could cull out those regulations that require little or no staffing and get them promulgated immediately. We could then allow more time for the more difficult judgments on needed regulations."

The memorandum tasked the Department of Defense with five immediate actions.

1. An E2-C as soon as possible to provide 12-hour per day coverage, seven days a week, to detect aircraft entering Florida illegally. (Customs has only requested five hours a day, five days a week, but this is being revised by Customs.)
2. A U.S. Air Force AWACS aircraft to provide the same coverage as the E2-C when the E2-C is not available.
3. The use of selected U.S. Navy ships in the Caribbean area to interdict suspicious ships transiting the Windward Passage. U.S. Coast Guard teams would be embarked to conduct the search and seizure.
4. The use of OV-1 aircraft with side-looking radar to monitor the Florida coastline.
5. The use of all air defense radars along the Florida coast to be netted with other available radars to detect aircraft penetrating illegally.

The Vice President gave a deadline of three weeks to the Department of Defense on deployment of the E2-C aircraft.

By memorandum dated March 2, 1982,[42] Deputy Secretary of Defense Frank Carlucci informed the Service Secretaries and the Joint Chiefs of Staff of their new responsibilities, stating: "I wish to emphasize to you my concern with being as responsive to the Task Force's requirements as the constraints of our primary mission will truly allow."

The civilian community

Just as the military community was caught unprepared for its involvement in the Vice President's task force, so were the civilian law enforcement agencies in Florida largely unprepared to identify their needs in terms of potential military assistance.

Customs, the Coast Guard, the Drug Enforcement Administration, and a host of State and local agencies had been engaged in a losing battle against drug smugglers for years, each laboring in the area delineated by its respective jurisdictional authority. Various federal-federal and federal-local task forces had been attempted from time to time, but their successes were limited because of jurisdictional jealousies, limited resources and lack of organizational ability to operate on the scale proposed by the Vice President. Sev-

[41] Memorandum, Appendix A.
[42] Memorandum, Appendix B.

eral hundred new federal agents were needed to implement the task force's new operational stratagies.

The sudden availability of military resources, previously forbidden, found the civilian agencies with programs and operational plans often incompatible with these new assets. On a national basis, there had been no threat assessments prepared with which to optimize the deployment of new radar assets. In fact, there was often ignorance of exactly what equipment or information was available through DOD.

Locallly, these problems were more acute. For example, the Customs Air Support Branch in Miami initially had too few pilots and aircraft to respond to all the targets being identified by the E2-Cs.

B. INITIAL IMPLEMENTATION OF MILITARY SUPPORT

During its early hearings on military assistance in South Florida, the subcommittee realized that all appropriate implementing regulations had not yet been devised. One concern was, however, that in its eagerness to launch a successful antismuggling campaign the Administration not commit military resources to the extent or in a way that would impair the readiness of the forces committed, and thus violate one of the limitations in the new authority, specifically 10 USC 376.[43]

On May 19, at the second hearing, Chairman English stated:

> At our earlier hearing on this subject, I noted that there are a number of limitations on the use of the military. First, the law prohibits the utilization of military resources if military preparedness is degraded as result. Second, the budgets of most civilian law enforcement agencies cannot support the high cost of military assistance.
>
> Accordingly, it is critical that we exploit our limited resources to the fullest. We must identify areas where the needs of the law enforcement community overlap with military training and operational requirements. This is the only way that meaningful, cost effective and lawful assistance can be provided by the Armed Forces.
>
> In the short run, the interdiction efforts have reportedly been successful. However, because of the legal and financial limitations just mentioned, what has worked in the short run will not work forever.[44]

For example, the subcommittee was concerned that the E2-C units deployed in south Florida, far from their base in Norfolk, Virginia, were not engaging in their required training exercises, and that, as a consequence, their combat readiness was being decreased.

A second concern was that insufficient planning would lead to inefficient use of resources, possibly setting unfortunate precedents and impugning the merit of the new law.

Exchanges with DOD witnesses at the hearings and in numerous meetings on these subjects indicated that these concerns were well founded.

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[43] See discussion, infra., p. 9.
[44] Hearings at pp. 31 and 32.

Prior to the subcommittee's second hearing Chairman English met with the Vice President to present these concerns and to offer some constructive alternatives.

Mr. English described to the Vice President a radar system which the Air Force had mentioned at the first committee hearing on February 22, 1982, as a possible alternative to deployment of the AWACS or E2-C aircraft.[45] There already existed in south Florida a tethered balloon, called an aerostat, which carried a radar to 12,000 feet over a fixed site, thus providing the downward-looking capability required by U.S. Customs to detect low flying smugglers over a large portion of the threat corridor defined by the law enforcement agencies.

The aerostat system was, in fact, capable of providing most of the same coverage being provided by the E2-C aircraft,[46] at a much lower cost and with no degradation of military readiness.

As a result of this discussion it was agreed that E2-C deployment could be reduced, and somewhat redirected; the newly added aerostat radar coverage keeping track of the remaining area.

Planning and coordination

The duplication of capabilities illustrated by the commitment of Navy E2-C resources when the Air Force already had in place equipment of similar capabilities clearly evidences the lack of a coordinative mechanism within the Department of Defense. This, when combined with a lack of a coherent communication of need by civilian law enforcement agencies, created a situation in which effective and cost efficient use of resources was impossible.

The lack of precise coordination in the case of the south Florida effort can be excused on the grounds that the law was new and the situation acute. A continuation of this lack of coordination, however, will inevitably create unacceptable waste and inefficiency. This is already becoming apparent in the areas of information sharing; military and civilian planning, coordination and communication; and future efficient use of available resources.

In this regard, P.L. 97-86 required DOD to issue implementing regulations for the use of each Service in devising instructions to the field. This document, DOD Directive 5525.5, was issued on March 22, 1982, over the signature of the Deputy Secretary of Defense.[47] It required Departmental and Service heads to initiate various internal and external planning and coordinative efforts, but many of the activities required have not yet been initiated or completed.

Information sharing

As an example, Directive 5525.5 states that the heads of DOD components shall:

> * * * Issue implementing documents incorporating the guidelines and procedures set forth in this Directive to in-

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[45] Hearings at p. 12.
[46] Correspondence from GAO to the subcommittee, March 20, 1982.
[47] See Appendix C.

clude. . . (i)mplementation of procedures for prompt transfer of law enforcement information.

At the hearing held on August 18, 1982, some 5 months after the effective date of Directive 5525.5, witnesses from the Army, Navy and Air Force conceded that they had not yet promulgated specific instructions to field commanders providing guidance on sharing of information. As a result, in most cases the field commander does not know what information would be of interest to a particular agency, does not know with certainty what information he is allowed to release, and does not know to whom and in what form he should address such information.

Military and Civilian Planning, Coordination and Communication

It is readily apparent that almost all coordination or communication between DOD, its components and the civilian law enforcement community takes place on a case by case request basis. With isolated exceptions, the Committee is unaware of any DOD long-range coordination with civilian agencies.

Directive 5525.5, however, required the Assistant Secretary of Defense (Manpower, Reserve Affairs, and Logistics) to: "Coordinate with civilian agencies on long-range policies to further DOD cooperation with civilian law enforcement officials."

It is through such meetings that the needs of each party will become more completely known to the other, and the potential for waste reduced.

When asked by Chairman English to describe the mechanism which DOD will use to handle future large numbers of law enforcement requests, Mr. Juliana replied: "We do not now have a mechanism if they came to us in great numbers to respond. We think that there has to be a mechanism developed. Now, what that mechanism is to be, maybe others other than the Department of Defense should decide."[48]

Future efficient use of available resources

This committee agrees with the sentiment of the Judiciary Committee, expressed earlier in this report, that the military should not be perceived as a routine supplier of basic equipment for civilian law enforcement needs. This necessitates however, that a mechanism exist which would insure that requests from the myriad law enforcement agencies across the country be screened and evaluated for need, and verified as to non-availability of the requested asset in the civilian law enforcement community. That mechanism does not now exist. Further, there is no existing interservice mechanism to ascertain whether a certain piece of equipment, such as a night vision device, which might be requested from one service but not available, be located within the inventory of another, and the request thus successfully fulfilled. As it stands today, the approval process for requests has not been clearly defined within DoD and its components. Certain major initiatives have been approved because of the priorities set by the White House, but as military assistance becomes more commonplace it will be necessary to institu-

[48] Hearings at p. 46.

tionalize procedures which do not depend on such political momentum.

C. INITIATIVES IN SOUTH FLORIDA

It is useful to review the efforts which have been expended by the Department of Defense so far in support of the South Florida Task Force. The policies and procedures of the DOD continue to evolve, and programs are constantly being more carefully tailored to suit civilian needs, which also are being refined. As the following discussion will show, most of the military efforts are at too early a stage to evaluate completely for effectiveness. Rather, they are illustrative of the types of assistance being provided.

Aircraft radar platforms—E2-C and AWACS

The first major involvement of DOD in the task force was the deployment by the Navy of a squadron of E2-C aircraft to Homestead Air Force Base near Miami. As previously mentioned, the purpose of the deployment was to provide U.S. Customs with the capability to detect and track low flying aircraft of the type frequently utilized by drug smugglers. Indications are that the presence of the aircraft quickly intimidated most smuggler/pilots, since detections dropped dramatically soon after their arrival.

The arrival of these aircraft was given a very high profile, much to the dismay of some who would have preferred to use them secretly for as long as possible. For those who supported the high profile approach to task force initiatives, the deterrence of smuggling attempts was hailed as of equal value to arrests of violators—drug smuggling into Florida was being suppressed.

The Air Force's AWACS (E3A) airplane, much larger than the Navy E2-C, and based at Tinker Air Force Base, Oklahoma, was not called upon during the first few months of task force activity. Only recently, its training schedule has been coordinated with Customs enforcement units, and its capabilities have been used to cover areas not otherwise covered, primarily in the Gulf of Mexico.

Seek Skyhook—The tethered aerostat

Also providing look-down radar coverage, but fixed in position, the Air Force's Seek Skyhook system was made available to Customs at the urging of the subcommittee to relieve the Navy of some of the dedicated E2-C support which was creating hardships in the deployed squadrons. Located at Cudjoe Key, Florida, its radar covers much of the area frequented by smugglers, and is available essentially 24 hours a day, seven days a week, for far less cost.

Also pursuant to the urging of the subcommittee, and in conformance with an amendment to the fiscal year 1983 DOD Authorization Act [49] offered by Subcommittee Chairman English, the Department of Defense and the Air Force have committed to construct a second tethered aerostat at Patrick Air Force Base, Florida.[50] This will, when completed, enhance NORAD's coverage of the southeastern United States while also providing aerostat cover-

[49] P.L. 97-252, Sec. 109.
[50] Hearings at p. 71.

age of the remainder of the identified smuggling routes.[51] The second aerostat, when operational, also will relieve the Navy of providing any further dedicated E2-C support, allowing them to assist on a more random basis as their training requirements permit.

It is in the implementation of this second system that a troubling case of bureaucratic inertia has surfaced. The Deputy Assistant Secretary of Defense (MRA&L) delivered a firm commitment when he stated on May 20, 1982:

> Now, Mr. Chairman, I am very pleased this morning—I was hoping I could give you this information sooner—but I am pleased to report that while we have not yet received an official response from the Army concerning the Blackhawk helicopters or the OV-1C aircraft, the Department of Defense has instructed the Air Force to place a balloon borne radar at Patrick Air Force Base. This will enable it to perform both an Air Force mission and serve the needs of the civilian law enforcement agencies simultaneously. The effect of this placement of the radar will be to enable us to monitor permanently the air corridor along the southeastern coast of Florida now most frequently used by those who smuggle drugs illegally into the country by air. The Air Force is currently in the process of identifying the funds necessary to make this placement and we expect the job to be completed in the next several months.
>
> Mr. Chairman, that is a firm commitment. The Air Force has been so instructed and we will proceed expeditiously.[52]

At the hearing on August 18, three months after Mr. Juliana's statement, the news from the Air Force was not so positive. Chairman English asked the Air Force witness, Assistant Secretary McCoy, when the aerostat site at Patrick Air Force Base would be operational, and reminded him of the 10-month commitment made by Mr. Juliana back in May.

Mr. McCoy responded: "We have to identify the funding and get the reprogramming. I think the reprogramming will be a lot longer than the identification." [53]

In the meantime, the Navy will continue to cover its responsibilities with aircraft which cost some $3,500 [54] per hour to operate, compared with a cost of only $400 [55] per hour to operate the aerostat. Obviously, the sooner the Air Force gets the second aerostat in operation, the sooner significant savings will occur. In fact, within 3 years the second aerostat will have paid for itself.

Navy towing service and ship sighting reports

The majority of drugs which come from South America by sea transit the narrow passages between the Yucutan Peninsula and Cuba (the Yucutan Passage), and between Cuba and Haiti (the

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[51] Id. at p. 73.
[52] Id. at p. 71.
[53] Id. at p. 126.
[54] Id. at p. 48.
[55] Id. at pp. 48 and 75.

Windward Passage). These passages are patrolled by the Coast Guard, and many "mother ships" loaded with marihuana have been seized there. Following such seizures in the past, the Coast Guard was required to tow the violator to Florida for processing, thus losing many days of on-station patrol time.

In the summer of 1982 the Navy agreed to use certain of their ships to take the seized vessels to the U.S. mainland. This greatly increased the Coast Guard ship/days on station.

In addition, the Navy has reemphasized to the captains of its ships the importance of reporting the sighting of potential smuggling vessels to the Coast Guard. The subcommittee's final report will comment on the success of this effort.

Army's Blackhawk helicopter to be tested by Customs

Customs has noted that as a result of enforcement pressure at the border, traffickers now are increasingly resorting to air drops of their cargos out at sea, where they are recovered by small speedboats and brought ashore. In addition, there is evidence that those smugglers who do attempt to penetrate the radar screen, and who are accosted by law enforcememt officers at remote, clandestine landing strips are arming themselves with automatic weapons to defend their illicit cargoes.

U.S. Customs officers have been operating four AH1-G Cobra helicopters which are on loan from the Army. While fast enough to assure early arrival on the scene, they carry only the pilot and one officer, and are not certified to operate over water at all. At the urging of the subcommittee, the Army has agreed to loan its newest helicopter, the UH60-A Blackhawk, to Customs for a six month test of its utility. The Blackhawk can carry up to a dozen officers at the same speed as the Cobra, and it is certified for operation over water. It is impervious to small arms fire.

Upon completion of the operational test a decision will be made regarding additional helicopter requirements.

IV. Findings and Conclusions

1. Despite some early confusion and administrative obstacles, the implementation of military assistance in the war on drugs, authorized in P.L. 97-86, has been quite effective. Without it, the Vice President's South Florida Task Force would probably not have been much more effective than its many predecessors.

2. There is a pronounced lack of effective liaison between the Department of Defense, the several Services, and the civilian law enforcement community. This results in inefficient, sometimes sporadic assistance in the short term, and almost total inability to conduct effective long range planning. It also impairs the ability of each agency involved to identify the needs and limitations of the other.

3. The civilian law enforcement community at both the federal and non-federal levels must accept some responsibility for the orderly implementation of P.L. 97-86. They must assist DOD in streamlining request procedures, verifying the need for the requested assistance, and preventing cavalier exploitation of DOD's resources.

4. The Air Force has not moved with dispatch on the identification of funds, reprogramming of those funds, and procurement of the second Seek Skyhook system for Patrick Air Force Base. This is in contravention to firm assurances made by the Department of Defense to the Committee. It also requires the Navy to continue dedicated E2–C coverage in South Florida at great expense and to the detriment of its flight crew training and aircraft maintenance programs.

5. There has been considerable delay in issuing implementing instructions to field commanders of the various Services, as required by Directive 5525.5. This delay postpones unnecessarily the timely dissemination of military information to civilian law enforcement agencies, and prolongs confusion over changes in policy regarding loan of equipment or other cooperation.

6. The U.S. Customs Service has neither employed a national drug trafficking threat analysis nor devised a national air interdiction strategy based on such an analysis. Both are mandatory to insure the most effective deployment and tactical use of their limited resources, and to identify and support requests for additional assets.

V. Recommendations

1. The Air Force should immediately expedite procurement of the Patrick Air Force Base Aerostat system.

2. The Customs Service, in conjuction with the Army and the manufacturer, should implement an objective operational test of the Blackhawk helicopter.

3. The DOD Deputy Assistant Secretary (MRA&L) should devise and implement a system to coordinate the handling of requests for assistance or information from the civilian law enforcement community. He should seek the advice and assistance of the user agencies at both federal and non-federal levels of enforcement.

4. Regarding Recommendation No. 3, DOD should recognize that much of the sharing of military information must rely on the initiative of the individual Services to identify and volunteer useful and timely data. The Services cannot simply wait for a request for drug-related information from agencies which may be unaware of its existence.

5. Recognizing that drug traffickers who have been deterred from operating in Florida will undoubtedly attempt to resume business in other areas of the United States, the task force concept, incorporating military assistance, should be expanded into areas of high risk as proposed by the Assistant Secretary of the Treasury (Enforcement).

6. The U.S. Customs Service should immediately devise and implement a national drug trafficking threat analysis and national air interdiction strategy. These documents should be updated on an annual basis.

APPENDIXES

APPENDIX A

THE VICE PRESIDENT,
Washington, D.C., February 24, 1982.

Memorandum for the Secretary of Defense
Subject: Defense support for the South Florida Task Force.

Dan Murphy has just returned from a three-day visit to the Miami area where he reviewed the current capabilities of the federal law enforcement agencies in the area. Based on his report, I feel that our joint efforts to fight crime in the South Florida area will require the following Defense assistance:

1. An E2-C as soon as possible to provide 12-hour per day coverage, seven days a week, to detect aircraft entering Florida illegally. (Customs has only requested five hours a day, five days a week, but this is being revised by Customs.)
2. A U.S. Air Force AWACS aircraft to provide the same coverage as the E2-C when the E2-C is not available.
3. The use of selected U.S. Navy ships in the Caribbean area to interdict suspicious ships transiting the Windward Passage. U.S. Coast Guard teams would be embarked to conduct the search and seizure.
4. The use of OV-1 aircraft with side-looking radar to monitor the Florida coastline.
5. The use of all air defense radars along the Florida coast to be netted with other available radars to detect aircraft penetrating illegally.

I know that you are conducting a rapid review of the recent changes to *posse comitatus* and expect to have guidelines out some time next month. I would appreciate it if you could cull out those regulations that require little or no staffing and get them promulgated immediately. We could then allow more time for the more difficult judgments on needed regulations.

The most immediate need following my announcement of our 16-point program is to get the E2-C down to Florida within the next three weeks. I appreciate all the help you have given the Task Force so far and know that I can count on your help in the future.

GEORGE BUSH.

APPENDIX B

THE SECRETARY OF DEFENSE,
Washington, D.C., March 2, 1982.

Memorandum for Secretaries of the Military Departments, Chairman of the Joint Chiefs of Staff.

Subject: DOD support to the Task Force on South Florida Crime Problems.

By letter of 24 February (attached), the Vice President has outlined the various types of support to civilian law enforcement agencies that will be required of the Defense Department for the Administration to achieve its drug suppression objectives in South Florida. In accordance with the revision of the laws governing military assistance to civilian law enforcement officials (Title 10, U.S.C., Chapter 18), I ask that you review the matters presented by the Vice President and, where feasible, prepare plans for providing the appropriate support. Your plans should include an analysis of associated readiness and financial costs.

The Principal Deputy Assistant Secretary of Defense, MRA&L, as my representative on the working group of the South Florida Task Force, will be responsible for coordinating the efforts of the Defense Department in this matter. You should forward to him your completed plans and analyses by Friday, March 5.

I wish to emphasize to you my concern with being as responsive to the Task Force's requirements as the constraints of our primary mission will truly allow. The Administration's objective of bringing under control the problem of illegal narcotics is one that warrants the best efforts of all Federal departments. I intend that the Defense Department do everything within its unique capabilities that it possibly can to contribute to this effort.

FRANK C. CARLUCCI,
Deputy Secretary of Defense.

Attachment.

APPENDIX C

DEPARTMENT OF DEFENSE DIRECTIVE NO. 5525.5

Subject: DOD Cooperation with Civilian Law Enforcement Officials.
References: (a) through (hh), see enclosure 1.

A. PURPOSE

This Directive establishes uniform DOD policies and procedures to be followed with respect to support provided to federal, state, and local civilian law enforcement efforts.

APPLICABILITY AND SCOPE

This Directive applies to the Office of the Secretary of Defense, the Military departments, the Organization of the Joint Chiefs of Staff, the Unified and Specified Commands, and the Defense Agencies (hereafter referred to as "DOD Components"). The term, "Military Service," as used herein, refers to the Army, Navy, Air Force, and Marine Corps.

C. DEFINITIONS

1. *Civilian agency.* A government agency (other than the Department of Defense) in the following jurisdictions:

a. The United States,

b. A State (or political subdivision thereof),

c. A territory or possession of the United States.

2. *Civilian law enforcement official.* An officer or employee of a civilian agency with responsibility for enforcement of the laws within the jurisdiction of the agency.

3. *DOD intelligence component.* An organization listed in subsection C.4. of DOD Directive 5240.1 (reference (a)).

D. POLICY

It is the policy of the Department of Defense to cooperate with civilian law enforcement officials to the maximum extent practicable. Under enclosures 2 through 5 to this Directive, the implementation of this policy is consistent with the needs of national security and military preparedness, the historic tradition of limiting direct military imvolvement in civilian law enforcement activities, and the requirements of applicable law.

E. RESPONSIBILITIES

1. The *Assistant Secretary of Defense (Manpower, Reserve Affairs, and Logistics) (ASD(MRA&L))* shall:

a. Coordinate with civilian agencies on long-range policies to further DOD cooperation with civilian law enforcement officials.

b. Provide information to civilian agencies to facilitate their access to DOD resources, including surplus equipment.

c. Coordinate with the Department of Justice, the U.S. Coast Guard, and the U.S. Customs Service on matters related to the interdiction of the flow of illegal drugs into the United States.

d. Develop guidance and approve actions as specified in enclosures 2 through 5 to this Directive taking into account the requirements of DOD intelligence components and the interests of the Assistance Secretary of Defense (Health Affairs) (ASD (HA)).

e. Disseminate promptly interim guidance to permit the approving authorities designated in enclosures 2 through 5 to this Directive to grant requests for assistance before the issuance of implementing documents.

f. Ensure that the responsibilities addressed in paragraphs a. through e. are conducted in a manner that is consistent with the needs of national security and military preparedness.

2. *Heads of DOD Components* shall:

a. Disseminate promptly the text of 10 U.S.C. §§ 371-378 (reference (b)), along with the interim guidance issued by the ASD(MRA&L) under paragraph E.1.e., above to ensure that field elements implement promptly congressional and departmental policy.

b. Review training and operational programs to determine how asistance can be provided to civilian law enforcement officials, consistent with the policy in section D., above with a view towards

identification of programs in which reimbursement can be waived under enclosure 5 of this Directive.

c. Issue implementing documents incorporating the guidelines and procedures set forth in this Directive to include the following:

(1) Implementation of procedures for prompt transfer of law enforcement information.

(2) Establishment of local contact points in subordinate commands for purposes of coordination with civilian law enforcement officials.

(3) Issuance of guidelines for evaluating requests for assistance in terms of impact on national security and military preparedness.

4. The *Director, National Security Agency (NSA)/Chief, Central Security Services (CSS)* shall establish appropriate guidance for NSA/CSS.

5. The *Joint Chiefs of Staff* shall:

a. Assist the ASD(MRA&L) in development of guidance for use by DOD Components in evaluating the impact of requests for assistance on national security and military preparedness.

b. Advise the Secretary of Defense and the ASD(MRA&L) on the impact on national security and military preparedness of specific requests for assistance when such officials act as approving authorities.

c. Advise approving authorities of the impact on national security and military preparedness of specific requests involving personnel assigned to a Unified or Specified Command.

G. INFORMATION REQUIREMENTS

A quarterly report of all requests for assistance (approved, denied, or pending) shall be submitted by the heads of DOD Components to the ASD(MRA&L), the ASD(HA), and the General Counsel, DOD, showing action taken (approval, denial, or pending), and other appropriate information. The format of such report shall be prescribed by the ASD(MRA&L) and will be prepared in accordance with DOD Directive 5000.11 (reference (c)). This information requirement has been assigned Report Control Symbol DD-M(Q) 1595. Actions involving the use of classified means or techniques may be exempted from such report with the concurrence of the ASD(MRA&L).

H. RELEASE OF INFORMATION

1. Release of information to the public concerning law enforcement operations is the primary responsibility of the civilian agency that is performing the law enforcement function. DOD Components may release such information, however, when approved under the procedures established by the head of the DOD Component concerned.

2. When a DOD Component provides assistance under this Directive, it may condition the provision of such assistance upon control by the DOD Component of the release of information to the public concerning such assistance.

I. EFFECTIVE DATE AND IMPLEMENTATION

This Directive is effective immediately. Forward two copies of implementing documents to the Assistant Secretary of Defense (Manpower, Reserve Affairs, and Logistics) within 120 days.

FRANK C. CARLUCCI,
Deputy Secretary of Defense.

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